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No. 91-1993

In The

Supreme Court of the United States

October Term, 1992

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

FIBREBOARD CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION RESTATED

Does the Due Process Clause of the Fourteenth Amendment prohibit a federal court in California, sitting in diversity, from applying California choice of law interest analysis so that a California local decisional rule, to the effect that punitive damages awarded in California are uninsurable, does not extend so far as to make uninsured a Texas punitive damages award which was rendered in favor of Texas residents, based on distribution of asbestos-containing products in Texas, and insurable under Texas law?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment XIV, § 1, which provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

2. 28 U.S.C. § 1652, The Rules of Decision Act, which provides: "The laws of the several states, except where the Constitution of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

A. Background

In 1957, Continental Casualty Company issued a comprehensive general liability policy covering Fibreboard's operations and liabilities. The policy, although issued to Fibreboard's home office in California, specifically referred to named insureds outside that State. Fibreboard carried on a forestry, lumber, and insulation products business, and distributed its products throughout the country. The policy expressly applied to occurrences wherever they may happen.

Continental's policy covered "all sums" for which Fibreboard became obligated to pay by reason of legal liabilities for bodily injuries. It did not exclude coverage for punitive or exemplary damages, and it did not contain a choice of laws provision.

Juries in the federal district for the Eastern District of Texas (*Cimino v. Raymark Industries, Inc.*, No. 86-0456 CA)

and in a West Virginia state court (*In re Asbestos*, No 84-C-3321, Circuit Court, Kanawah County) held Fibreboard liable in asbestos cases for punitive damages, as courts in those states defined them, in 1990 and 1989, respectively. The judges instructed those juries under state standards less strict than the rules then in effect in California governing imposition of punitive damages. The West Virginia court permitted reckless conduct to suffice. The Texas court used a "gross negligence" standard, which in practice translated into a "conscious disregard" test, but with elements of constructive knowledge embodied in the instructions. These looser standards may be explained by the multiple purposes behind punitive damages in Texas and West Virginia, that is, compensation in one way or another joined punishment and deterrence as reasons recognized by both states to impose punitive damages.

Both Texas and West Virginia also allowed their punitive damages awards to be insured, because many of the purposes underlying punitive damages in those states would not be thwarted by insurability. California courts established a rule in 1979 which did not allow California punitive damages awards to be insured, lest the exclusive purposes of California punitive damages, punishment and deterrence, be undermined. *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31, 151 Cal.Rptr. 494 (1979). No California reported decision has ever held that California law or policy prohibits insurance of punitive damages imposed under the laws of another state, particularly, a state where the award is insurable.

B. Contentions in the District Court

Continental sued Fibreboard in United States District Court, Northern District of California, seeking a declaration

that it was not responsible for the Texas or West Virginia punitive damages awards. Then it filed a summary judgment motion. Continental pointed out correctly that, because jurisdiction rested on diversity, the District Court was to apply forum law, including forum choice of law rules. Continental claimed that under a "traditional" California test, embodied in California Civil Code section 1646, a contract is to be "interpreted" according to the law of the place of performance, or if none is indicated, according to the law of the place where it is made. It then argued at length that under California's governmental interest test (California's choice of law method), California's local rule proscribing insurability governed. Fibreboard opposed Continental's motion.

First, Fibreboard pointed out, repeatedly, that the issue was not one of contract interpretation, for the policy "all sums" language plainly encompassed punitive damages. *Ohio Ins. Co. v. Hubbard,* 162 Cal.App.3d 939, 208 Cal.Rptr. 806 (1984); *American Home Assurance Co. v. Safway Steel Products Co.,* 743 S.W.2d 693 (Tex.Civ.App. 1987); *Hensley v. Erie Ins. Co.,* 283 S.E.2d 227 (W.Va. 1981). Thus, California Civil Code section 1646 had nothing to do with the case.

Second, Fibreboard observed that, after changes in 1987 to California statutes, courts in California could impose punitive damages only on clear and convincing evidence, and for intentional conduct, or despicable conduct carried on with a willful and conscious disregard of the rights of others. Fibreboard contended that unless the current strict California standards were satisfied, California public policy was *not* to punish the conduct in question. That meant, of course, that California would not

prevent insuring conduct it would not even punish. Since the Texas and West Virginia awards did not come close to meeting California's current standards for punishment, insuring them did not offend California's policy designed to make sure that those who deserved punishment stayed punished, and so there was no conflict.

Third, Fibreboard analyzed governmental interest factors and showed that, even were there a conflict, Texas and West Virginia had much greater interests – which would be more impaired by applying any California rule preventing insurability – than did California in having its local rule apply. Accordingly, Fibreboard asked the District Court, if it found a conflict, to apply Texas and West Virginia law, both of which approved insurability.

Continental submitted a reply. It neither claimed there existed any issue of contract interpretation in the case, nor did it mention California Civil Code section 1646. It did argue that California's interests were paramount.

In none of its arguments to the District Court did Continental mount any constitutional contention.

C. The District Court's Ruling

The District Court, Presiding Judge Thelton E. Henderson, found there was no question that the language of the policy, which insured "all sums" with no punitive damages exclusion, provided for insurance of the punitive damages at issue. (App. 12a). Continental does not quarrel with that conclusion, confirming that this is not (as it never was) a case of contract interpretation, and

hence not a case involving California Civil Code section 1646.

Because of the apparent interests of the three states in the case, Judge Henderson analyzed California, Texas, and West Virginia law under California's "governmental interest" choice of laws test. (App. 6a).

The District Court first decided whether a conflict existed between the law of California on the one hand, and Texas and West Virginia on the other, with respect to the insurability of punitive damages.

The court looked to whether the Texas and West Virginia juries found Fibreboard liable for conduct which satisfied thresholds existing for punitive damages in those states, but which would not justify imposition of punitive damages in California, for if that was the case, California public policy would not prohibit insurance. It found the West Virginia award did not meet California's punitive damages standards, so California did not prohibit insuring it. Continental does not challenge that decision.

However, Judge Henderson found that under the pre-1987 California punitive damages rules, the Texas conduct would merit an award of punitive damages in California. The District Court did not address Fibreboard's point that the post-1987 punitive damages standards embodied California's current policy on insurability of such damages, and that California would *not*, under the new standards, punish Fibreboard on jury instructions anywhere near as loose as those used by the Texas court in *Cimino*. Were Fibreboard's point accepted, California law would not punish, and would not prohibit

insurance for, the conduct at issue here. Continental, then, would have no basis to urge there is even a choice of law issue, let alone a constitutional issue.

Because he found a true conflict between California and Texas, however, Judge Henderson applied the "comparative impairment" analysis of California's governmental interest choice of laws test. This required the court "to determine which policy is more significantly impaired by the application of the law of the other state. The law of the more significantly impaired state is to be applied." (App. 19a)

Judge Henderson found that the interests of Texas (where the cause of action arose and where the injured plaintiffs resided) would be more impaired by the application of the California rule against insurability of punitive damages, than would the interests of California (where the insured Fibreboard was headquartered and the policy delivered) be impaired by the application of the Texas rule. The court perceived that California had no interest in extending into other states California policies designed to protect its citizens (App. 20a). Rather, Texas had a greater interest in the policies it believed to be in the best interests of Texas citizens, such as promoting compensatory purposes behind its punitive damages rules (App. 22a). The court also recognized a California interest in applying its law to an insurance contract entered into in California, including the interest in promoting foreseeability as a matter of contract interpretation (App. 24a, 26a). But the California rule prohibiting insurance of California punitive damages awards was not adopted until 1979, and Continental's policy issued in

1957. Hence, the predominant interest was that of Texas, the place of the wrong (App. 26a, 27a).

Accordingly, Judge Henderson found Texas law governed insurability of the Texas awards, and under Texas law, they were insurable. He denied Continental's motion for summary judgment and, since there was no dispute as to material facts, entered judgment for Fibreboard.

D. Continental's Appeal to the Ninth Circuit

Continental appealed, rehashing the arguments it made to the District Court, and adding a claim that Judge Henderson's *application* of California's choice of laws test denied Continental due process because he did not conclude that California's interests were superior to those of Texas. Continental never attacked the constitutional validity of California's choice of laws test; indeed, Continental again invoked that test as compelling a result in its favor. After thorough briefing and oral argument, a unanimous panel of the Ninth Circuit ruled against Continental. The panel affirmed the District Court's ruling, endorsing the reasoning of Judge Henderson's opinion. (App. 29a)

Continental filed a petition for rehearing, and requested rehearing *en banc*. The same Ninth Circuit panel unanimously rejected Continental's petition. None of the judges of the Ninth Circuit voted to rehear the case *en banc* (App. 30a).

E. Continental's Petition to this Court

Continental's Petition presents for the first time a claim which it did not make to the District Court or to the

Court of Appeals, that state choice of laws rules which do not give paramount importance to the "reasonable expectations of the parties" are unconstitutionally unfair as examples of "formless interest balancing."

SUMMARY OF ARGUMENT

1. This case embodies none of the special and important reasons for certiorari. Continental did not even urge upon the Courts below the arguments it makes here. Continental does not support any of its claims that courts are using choice of law either to maximize liability of insurers or to render decisions denying due process. There is no need to "clarify" constitutional principles.

2. Continental argues that what it calls the "need to respect the reasonable expectations of the parties" should control the outcome in this kind of case. It offers no way to "respect" those expectations short of making place of contracting the constitutionally compelled choice of law rule. There is no basis for any such rule.

3. No confusion exists in the constitutional principles affecting choice of law rules to be clarified, certainly none relevant to this case. Due process requires only that a forum state's choice of laws not be arbitrary or fundamentally unfair. The court looks to the state interests involved. No one can plausibly claim that Texas lacked sufficient interest for its law to govern insurability of a Texas punitive damages award rendered in a Texas court for injuries to Texas citizens arising from distribution of products in Texas.

4. This is not a case where a court upset the parties' reasonable expectations, in an unconstitutional way or otherwise. An insurer who markets and sells business policies for nationwide coverage must expect that the laws of various states may apply and public policies of many states may bear on its obligations. Thus, Continental could not expect the local rules of any particular state to control all issues that might arise across the country. This is not a case where a court disregarded a policy provision, for the policy language beyond question covers punitive damages. Continental could have no reasonable expectation in 1957 that under California law punitive damages were not and never could be insurable in California, let alone in all the states in which claims against Fibreboard might arise.

ARGUMENT

I. This Petition and the Choice of Law Decision in this Case Do Not Present Any Special and Important Reasons for Review by Certiorari.

None of the illustrative reasons to be considered in determining whether to grant certiorari set forth in Rule 10.1, Rules of the Supreme Court of the United States, apply or are even claimed to apply here. Continental does not identify any conflict between decisions of the United States Courts of Appeal or between a high state court and a federal court of appeal. The Court of Appeals decided no important question of federal law (nor did the District Court) which should be settled by this Court. Nor does Continental identify any federal question decided in a

way that conflicts with applicable decisions of this Court. In truth, the District Court did not determine any federal question, constitutional or otherwise, because Continental put no such question to it. The Ninth Circuit Court of Appeals affirmed on the reasoning of the District Court.

In addition, before the Ninth Circuit, Continental never urged that use of California's choice of law rules, what it now terms "formless 'interest balancing' " (Petition 6, 16), denied due process or offended the Constitution in any other respect. At most, it argued almost as an afterthought that application of the rules to produce an insured award somehow violated due process. So it is that neither of the lower courts considered the contentions Continental now urges, because Continental did not make them. The question therefore is not fairly before this Court. *See O'Connor v. Ortega*, 480 U.S. 709, 729 (1987); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539, fn.5 (1985); *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

At least three times, Continental accuses courts, including the courts below, of using an interest balancing test as a way of maximizing insurance coverage (Petition 5, 13, 14). Not one case is cited as authority for, or as an example of this phenomenon. Certainly the opinion of Judge Henderson does not warrant Continental's accusation.

The remaining proffered reason for grant of certiorari is the claim that courts in insurance coverage cases frequently ignore actual and justifiable expectations of the parties in balancing relevant state interests (Petition 5). The courts below did not do so. Continental cites no

reported decision in which it believes that parties' expectations were ignored. In fact, it cites no case – other than its arguments about this one – to show any court has employed choice of law balancing tests to deprive an insurer of due process, despite its assertion, bereft of supporting authorities, that "constitutional limits are being routinely ignored" (Petition 19). Put simply, there is no wave of unconstitutional choice of law insurance coverage decisions inundating the country. Continental cannot point to even one.

Instead, Continental argues that courts reach divergent results in choice of law decisions involving insurance coverage for multi-state torts (Petition 15). It asserts that courts are faced with competing interests of respective states and differing insurance laws (Petition 16). Then it posits "acute confusion." This it says arises with some courts, according to Continental, routinely applying the law of the state where injury or pollution occurred, (Petition 16-17), with others picking a single state's law, albeit one of several choices, to determine insurance coverage obligations (Petition 17-18). Continental does not represent accurately what these courts are doing. Rather, a fair reading is that courts are applying choice of law tests, most often some type of interest analysis, and coming up with various results depending on the issues and the competing state interests involved.[1]

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[1] *See, e.g. G. Heilman Brewing Co. v. Royal Group, Inc.*, 1991 WL 120366 (S.D. N.Y., June 21, 1991) (in environmental coverage action, Michigan (site of pollution) had greater interest than Maryland (insured's principal place of business and where policy issued) because Michigan, not Maryland, would suffer the long-term consequences of environmental damage); *Jones Truck*

Having posited "acute" and "prevailing" confusion, Continental makes the enormous leap. It invites this Court to step in (Petition 18). Nowhere does the Petition demonstrate *why* this Court should intervene. What Continental calls "confusion" is nothing more than the results different state courts reach in applying state rules in different contexts and arriving at appropriate rules of

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Lines v. Transport Insurance Co., 1989 WL 49517 (E.D. Pa., May 10, 1989) (Missouri (site of insured's contaminated property) had a more significant interest than Texas (contract executed by insurer) or Arkansas (contract counter-signed by insured) in outcome of insurance coverage litigation); *Gilbert Spruance Co. v. Pennsylvania Manufacturers Ass'n. Ins. Co.*, 603 A.2d 61 (N.J. Super. 1992) (New Jersey (forum and place where pollution occurred) had dominant interest in protecting health and safety of its citizens and ensuring clean-up of its environment); *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 777 P.2d 1259 (Kan. 1989), *cert. den.*, 493 U.S 1036 (1990) (Kansas (forum and where wrongful death occurred) applied its punitive damages insurability bar because it had stronger interest in protecting its citizens by deterring wrongful conduct within its borders than Delaware (where product manufactured)); *CPC Int'l., Inc. v. Northbrook Excess & Surplus Ins. Co.*, 739 F.Supp. 710 (D.R.I 1990) (in interpreting policy language, New Jersey (insured's principal place of business) has stronger interest in protecting its residents than Rhode Island (site of groundwater contamination)); *National Starch & Chem. Co. v. Great Amer. Ins. Co.*, 743 F.Supp. 318 (D.N.J. 1990) (to interpret various policy provisions, New Jersey (forum, where insured located, and place of majority of contaminated sites) has stronger interest in ensuring compensation of its residents and protection of its environment than New York (where insurer located and policy signed)); *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990) (West Virginia (forum and place where waste material originated, but did not contaminate) has slight interest in policy interpretation versus New Jersey (where insured headquartered and contract entered into)).

decision, all as contemplated by interest balancing. Federal courts sitting in diversity act no differently; they must apply the forum state's choice of law rules. *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487 (1941). Choice of law rules are and long have been a matter for state common law. *Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 823, 834 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307, (1981); *Kryger v. Wilson*, 242 U.S. 171, 176 (1916). There is no basis or reason for this Court to interfere with state choice of law rules, absent constitutional infirmities, which Continental does not reveal. Continental admits that variation in results of choice of law analysis is not a matter of federal concern (Petition 15), yet it shows no more than that. There is no reason to grant certiorari.

II. Constitutional Law Does Not Require Courts to Make Parties' Expectations Control Choice of Law Analysis, or to Freeze Choice of Law or Constitutional Rules at the Time a Contract Is Entered Into.

To conjure up a colorable constitutional claim, Continental must, and its Petition necessarily does, go to extraordinary lengths. It is true that when considering fairness in the context of the forum state's interest, an important element is the expectation of the parties. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). Continental transmutes this into a "key factor" (Petition 5), then to the "primary constitutional factor" (Petition 19). Time and again it stresses the "need" to "respect" the "expectations of the parties." But what does that mean? For Continental, in this case, it means there is *one* factor, "*the* factor that should *control the outcome* in this kind of case – the need to respect the reasonable expectations of

the parties at the time they entered into the contract" (Petition 13; emphasis supplied). So it necessarily follows, according to Continental, that the "formless" interest balancing approach, employed by innumerable courts,[2] must be sacrificed in favor of the *controlling* factor, the parties' expectations. In short, Continental invites this Court to outlaw interest balancing in choice of law as violative of due process.

The Continental analysis actually is even more extreme, for it starts with the notion that those expectations (which must be "respected") include reliance on perpetual application of choice of laws rules thought to have been in vogue at the time the parties made the contract. Thus, Continental announces that in 1957, California courts read Civil Code section 1646 as mandating that California law govern all contracts performed or entered into in California.[3] Going even further, Continental

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[2] And recognized by this Court as the dominant mode of choice of law analysis, as well as constituting the basis for due process inquiries. *Allstate Ins. v. Hague*, 449 U.S. 302, 308 and notes 10, 11.

[3] Authority Continental cites, *Wheeling v. Financial Indem. Co.*, 201 Cal.App.2d 36, 40-42, 19 Cal.Rptr. 879, 882-84 (1962) does not say that. It looked to California statutes to assess the validity of a California motor vehicle insurance policy, and held that statutes, requiring that such insurance cover any person using the vehicle, rendered invalid an exclusion for military drivers. *Wheeling* does not purport to hold that section 1646 controls all questions (particularly since the statute, by its terms, covers only interpretation), nor does *Wheeling* suggest or promise either that section 1646 would be construed forever to control choice of law on interpretation issues, or that its principles were constitutionally compelled. As Continental admits, recent California decisions do not read section 1646 literally

claims that *lex loci* principles in 1957 were viewed as constitutionally compelled (Petition 9-10).[4] From all this, Continental concludes that the parties' expectations included decisional law then in force (Petition 10). The logical result, and the only one that can lead to the outcome Continental needs, is to lock courts and parties into constitutional doctrine and choice of law rules of years ago, no matter how poorly they comport with modern thinking, all under the guise of "respecting" parties' expectations. Continental disclaims any thought that this would "federalize" choice of law or force a return to *lex loci* doctrine (Petition 15), yet that is exactly what its "need" to "respect" expectations would do. In effect, Continental's construct would "federalize" choice of law, in a way that imports into every contract, as a matter of due process, whatever conflicts rules existed when and where the contract was signed.

It is only by thus misdefining the law that Continental can claim that this Court's opinions may not have been sufficiently clear (Petition 19), or that courts are not heeding the message of the law as thus misdefined (Petition 5-6). No need for clarification arises just because this

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(Petition 9, n.7). Nothing in the Constitution obliges California courts to read this California statute literally.

[4] It is a misreading of this Court's early cases to suggest that *lex loci* was ever a constitutional rule. Those cases simply did not permit a state with no, or minimal, interests to invalidate express terms of contracts made in other states where those terms were valid. *See discussion of Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), at §III, *infra*.

Court's decisions do not define the law or send the message Continental suggests, a subject to which we now turn.

III. Due Process Permits a Broad Scope of Choice of Law, and Application of a State's Laws That Is Not Fundamentally Unfair Is Perfectly Permissible.

Early cases of this Court held that a forum state may violate due process if it enlarges the obligation of an insurance contract beyond its terms by the device of invalidating a condition, valid in the state where made, if the forum state (1) has no connection with the contract, the subject of insurance, or the parties (save the nominal residence of the insured) (*Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)), or (2) seeks to apply its law "regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract," *Hartford Acc. & Ind. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934). Nothing like that happened here. The courts below did not nullify a term of a contract valid where made regardless of interests of the affected states. Continental's complaint is that the District Court refused to hold invalid Continental's promise to pay "all sums," because it concluded that California's public policy against insuring local punitive damages awards did not reach into Texas and control insurability of awards there. That decision, affirmed by the Ninth Circuit, was perfectly consistent with the due process jurisprudence this Court has developed.

Indeed, as Continental concedes, this Court has recognized that the Constitution permits application of the

law of more than one state, and has authorized choice of law of any state with sufficient contacts with a dispute (Petition at 7). That concession should end the matter, for no one can claim a lack of sufficient Texas contacts here. This Court's cases make that conclusion clear beyond doubt.

We start with *Watson v. Employers Liab. Assn. Corp.*, 348 U.S. 66 (1954). The insurance policy was negotiated and issued in Massachusetts (home of Gillette, the parent company) and delivered in Massachusetts and Illinois (where Toni, the subsidiary, was located). Laws of both those states recognized as binding and enforceable a policy clause that prohibited direct actions against the insurer until after final determination of the insured's obligation to pay plaintiff. Mrs. Watson, injured in Louisiana by a Toni permanent wave, sued under Louisiana's direct action statute permitting suit before such final determination. This Court reversed dismissal of her complaint.

The Court in *Watson* observed that some local contracts affecting nothing but local affairs may well justify denial to other states of power to alter those contracts (348 U.S. at 71). But, the Court pointed out, a vast part of the nation's business affairs do not present such simple local situations. The insurance contract, although issued in one state, was to protect the insureds against damages that might be suffered anywhere in the country (348 U.S. at 71-72). More than one state may regulate widespread business activities. Louisiana had a real interest in insurance policies designed to assure payment of damages to those injured in Louisiana, and in safeguarding the rights of persons injured there (348 U.S. at 72-73). This Court

concluded: "In view of that interest, the direct action provisions challenged here do not violate due process" (348 U.S. at 73).

There is just as much a constitutionally sufficient interest in applying Texas law to safeguard the interests of persons injured in Texas by products distributed in Texas, as Louisiana had in *Watson*. Certainly if Continental had sued in Texas, due process would not compel a Texas court to ignore Texas law, and to apply a California local rule applicable to California punitive damages awards under standards and for purposes different than those in Texas. The result cannot be different because Continental sued in California.

Later decisions established the test that a state's substantive law may be selected in a constitutionally permissible way if the state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality); *see* 449 U.S. at 326 (Stevens, J. concurring); 449 U.S. at 333 (Powell, J., dissenting with Chief Justice Burger and Justice Rehnquist). This Court affirmed the plurality formulation in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985).

By no stretch can it be said that Texas lacks sufficient contacts creating state interests such that choice of its law is arbitrary or fundamentally unfair. By comparison, in *Allstate Ins. Co. v. Hague*, the decedent lived in Wisconsin, the operators of both vehicles resided in Wisconsin, and the accident happened in Wisconsin. Yet Minnesota constitutionally applied its law, which permitted "stacking"

of uninsured motorist limits, based on decedent's employment in Minnesota, the insurer's doing business there, and post-accident residence by plaintiff, decedent's wife, there. Surely it cannot be argued, and Continental does not contend, that the aggregation of contacts consisting of 1) Texas location where products were distributed; 2) Texas residence of injured persons; 3) Texas courts which made underlying awards, and 4) coverage nationally by the insurance policy, are so insignificant and create such minuscule state interests as to make applying Texas law arbitrary or fundamentally unfair.[5]

Rather, Continental argues that the courts below frustrated its reasonable expectations, which, it asserts, should control the outcome. The authorities do not support Continental.

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[5] Continental points out that *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924) held unconstitutional a Texas statute providing that an insurance contract payable to a Texan is a Texas contract, as applied to out-of-state parties (Petition 12, n. 13). It does not claim that the decision below ran afoul of *Dunken*. Nor could it, because the District Court did no more than rely upon a Texas case, *American Home Assur. Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693 (Tex.App. 1987), which, *inter alia*, cited the statute, simply to help identify the Texas interests at stake in the governmental interest analysis (App. 26a).

For the same reason, Continental's citation of *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865 (5th Cir. 1990) is unavailing. In addition, the insured in *W.R. Grace* settled and paid the plaintiffs, which meant the Texas interests "dropped out," leaving a contract interpretation dispute between a New York company and New York insurers where the governing law would be New York law. Hence, the Fifth Circuit ordered dismissal of the third-party action (896 F.2d at 872). That case did *not* involve questions of competing public policies as this one does.

IV. The Rulings Below Did Not Defeat Continental's Reasonable Expectations, Certainly Not in Any Constitutionally Significant Way.

A. Continental Could Have No Reasonable, Constitutionally Protected Expectation That California Law Always Would Apply In Every Case.

Watson v. Employers Liab. Assur. Corp., supra, does more than answer Continental's due process question as a matter of identifying adequate state interests. The opinion, rendered in 1954, put Continental on notice three years before it issued its policy to Fibreboard that insurance contracts, consistent with due process, will be subject to laws of states throughout the country which have interests of injured residents to safeguard. Surely Continental no longer could harbor a reasonable expectation that *lex loci* rules necessarily would govern, if indeed any such expectation ever had been reasonable. Three years before Continental wrote its policy, this Court announced that the law of place of injury could apply, based on the interest of that state, even where the result invalidated a contract clause valid where made. *See also, Hoopeston Canning Company v. Cullen* 318 U.S. 313, at 316-317 (1943).

In 1964, *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, applying a forum law which nullified policy clauses that required suit in less than five years, further demolished the premises of Continental's arguments. The Court pointed out that while the case law of Illinois, where the insured had purchased the policy, permitted shorter periods than prescribed by Illinois statute, no Illinois decision had extended the case law rule into other states. (Similarly, no California decision has extended its rule

governing insurability of California punitive damages awards into other states.) This Court saw "no difficulty whatever" under the due process clause. 377 U.S. at 181. Adopting the views of Justice Black in an earlier dissent, the Court pointed out that insurance companies sell to "customers who are promised protection in States far away from the place where the contract is made." 377 U.S. at 182. The point applies here. The policy in *Clay* did not even attempt to provide that Illinois law would govern when suits were filed elsewhere. *Id.* Neither did Continental include a choice of law clause. In our case, it cannot be said that contacts with Texas were "wholly lacking," or "too slight and too casual," which is how the *Clay* opinion characterized *Home Ins. Co. v. Dick* and *Delta & Pine Land Co. Id.*[6]

Allstate Ins. Co. v. Hague, supra, makes it even more clear that Continental can have no legitimate complaint that the rulings below defeated its reasonable expectations so as to violate due process. That case permitted Minnesota to apply its law allowing policy limits to be "stacked," whereas Wisconsin, the residence of the insured and place of accident, did not. The plurality pointed out that the insurer could not be certain Wisconsin law necessarily would control every accident which

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[6] *Clay* and *Watson* cannot be distinguished on grounds they involved statutes creating narrow procedural exceptions to *lex loci* principles, as Continental tries to do (Petition 14, n. 15). *Clay* involved the same kind of time-to-sue clause as did *Home Ins. Co. v. Dick* and *Delta & Pine.* What happened is that this Court recognized the legitimacy of state interests in choice of law determinations. And it did so before Continental ever wrote the policy involved here.

occurred in Wisconsin. 449 U.S. at 316, n. 22. The insurer had a presence in the forum; it must have known it could be sued there, and that the forum might apply its law. 449 U.S. at 317-318. Similarly, Continental does not disclaim doing business in Texas.[7] Like Allstate who anticipated covered accidents nationwide for Mr. Hague because its policy offered coverage nationwide, Continental specifically anticipated that Fibreboard might suffer a loss in Texas or elsewhere in the United States, for its policy covered occurrences wherever they may happen, and named insureds listed in the policy included people and companies in Maryland and Colorado.

In his *Allstate* concurrence, Justice Stevens observed that the parties could make their expectations explicit by a choice of law clause or a clause specifically covering the point at issue. (Continental, of course, provided a policy whose language did cover the awards here at issue.) And Justice Stevens concurred that coverage of insured risks throughout the country showed the parties certainly could have anticipated that laws of other states would govern particular claims. 449 U.S. at 329. Again, the same is true here. The plurality, Justice Stevens, and the dissent (449 U.S. at 336) agreed that no reasonable expectations of the parties were frustrated. As in *Allstate*, "there is no

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[7] Indeed, Texas case law seems to indicate that Continental has been selling insurance policies, as well as suing and being sued, in Texas for most of this century. *See, e.g., Continental Casualty Co. v. Wade* 105 S.W. 35 (1907), *Watts v. Continental Casualty Co.* 18 S.W.2d 591 (1929); *Continental Casualty Co. v. Swink* 329 S.W.2d 443 (1959); *Winn v. Continental Casualty Co.*, 494 S.W.2d 601 (1973); *Continental Casualty Co. v. Hall*, 761 S.W.2d 54 (1988).

element of unfair surprise or frustration of legitimate expectations as a result of [California's] choice of [Texas] law." (449 U.S. at 318, n. 24; plurality opinion).

It follows, we submit, that even if California law in 1957 prohibited coverage for punitive damages, Continental had no reasonable basis to assume that such a rule would apply throughout the country, wherever claims could be made and coverage questions adjudicated. The fact is, though, California had not enunciated any rule outlawing insurance for even local punitive damages awards by 1957, and it never has established such a rule for foreign awards, to this day.[8]

B. The Insurance Policy, Under California Law in 1957, Did Not Exclude Coverage for California Punitive Damages, And Certainly Not for Awards Rendered Elsewhere.

This is not a case like *Home Ins. Co. v. Dick*, or *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, where

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[8] The courts did not actually begin to establish state policies on the insurability of punitive damages until the 1960's. *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1964), is generally regarded as seminal in stating the policy against insurability, while *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964), led the way in allowing insurability. At the time Continental issued its policy, only one state, Missouri, had even the rudiments of a policy precluding insurability. *Ohio Casualty Ins. Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. den.* 295 U.S. 734. As noted above, California did not enunciate its policy until 1979 in *City Products Corp. v. Globe Indem. Co.*, 88 Cal.App.3d 31, 151 Cal.Rptr. 494. *See also*, 16 A.L.R.4th 11, especially sections 3-6 listing various states' positions.

the policies contained express provisions, and the question was whether laws of forum states with no significant connections to the transactions could nullify the parties' expectations as plainly set forth. The express "all sums" language of the Continental policy covers punitive damages. There is no other evidence of the parties' actual expectation, reasonable or not.

The Continental argument rests on a kind of legalistic, constructive expectations reasoning, which goes like this: The insurance policy incorporates the law, the law says the parties' expectations also include the law, so there was no need to include a California choice of laws provision or an exclusion of punitive damages, for the law did all of that for Continental anyway (Petition 10-11). The argument does not withstand analysis.

Continental could count on California choice of law rules governing only suits in California courts, under *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941). It had to anticipate that each state in which litigation could arise would apply its own choice of law rules. So, to start with even California choice of law rules as invariably controlling would not have been a justified expectation. And nothing compelled California to apply the law of place of contracting, especially in a case like this.[9] *Phillips Petroleum v. Shutts, supra,* at 838 (Stevens, J. concurring).

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[9] Little need be said of Continental's argument that the parties by conduct showed they thought California law applied (Petition 11-12). The *In re Asbestos Coverage Cases,* in California, as respects Fibreboard, involved policy interpretation questions, not issues of choice of law as between public policies controlling insurability. This is not an interpretation case. Even

Equally important, this is not a case where parties' expectations can be gleaned readily from perusing pertinent law. There is no contract term here which takes its meaning from a code section as construed by a prior court decision, as in *California Ass'n. of Highway Patrolmen v. California Dept. of Personnel Admin.*, 185 Cal.App.3d 352, 229 Cal.Rptr. 729 (1980) (cited at Petition 10). Nor is this a case in which statutory law positively prescribed the scope of insuring provisions for policies delivered in California, as in *Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal.App.3d 26, 37, 130 Cal.Rptr. 446, 452 (1976), or decisional law made an exclusionary clause invalid when the insurer delivered the policy, as in *Interinsurance Exchange v. Ohio Cas. Ins. Co.*, 58 Cal.2d 142, 146, 373 P.2d 640 (1962).

Rather, Continental must rely on a general provision, California Insurance Code Section 533, which provided: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Continental's "logic" is that section 533 barred coverage for willful acts, willful acts give rise to punitive damages, so punitive damages are barred from coverage by section 533 (Petition 10-11). Indeed, section 533 is the sole basis on which Continental contends that in 1957 punitive damages were not insurable. The fallacy in its reasoning is this: While willful acts could create liability for punitive damages, in 1957 punitive damages could also be awarded for something less culpable than willful acts.

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if it were, the choice of law would not rise to the level of a constitutional inquiry.

Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 869-70, 118 P.2d 465 (1941) (wanton and reckless misconduct justifies punitive damages); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 811, 174 Cal.Rptr. 348 (1981). In *Peterson v. Superior Court*, 31 Cal.3d 147, 158-59, 642 P.2d 1305 (1982) the California Supreme Court summarized established law as:

> "Nonintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable that harm will result. (*Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 286, quoting and explaining *Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 870 . . .)" (*Ford Motor Co. v. Home Insurance Co.* (1981) 116 Cal.App.3d 374, 381.) In those cases, section 533 is not applicable because the harm has not resulted from a "wilful act," thus only indemnification of the punitive damages portion of the recovery is prohibited.

Thus, not all punitive damages result from willful acts. It follows that a bar against insuring willful acts does not bar insuring all punitive damages.

In fact, the "reasonable expectations" analysis comes out the exact opposite of where Continental needs it to be in this case. That is because Continental never contended that section 533 applied to Fibreboard's conduct (if it did, it would prohibit indemnity for compensatory damages, too). If California Insurance Code section 533 constituted *the* bar to insurability of bad conduct in 1957, and Fibreboard's conduct did not trigger the bar of section

533, then the expectations were that *these* punitive damages *are* covered. The District Court was on firm ground in holding that it was not until 1979 that California adopted the rule against insuring California punitive damages awards, at least awards such as those in this case, with *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31, 151 Cal.Rptr. 494 (1979).

As we pointed out above, in 1987 California tightened its punitive damages rules so that its current policy would be not to punish (and hence not prohibit insurability for) the conduct at issue in Texas. Continental winds up urging application of a California judge-made rule which (1) did not exist in 1957 when the insurance policy issued, (2) would not apply to the *Cimino* (Texas) awards in 1990, because the standards in *Cimino* did not then meet California standards, (3) never has been extended outside California to govern awards by juries in other states under less strict standards, and (4) is at odds with the coverage rule of the state of rendition. There can be no "reasonable expectation" of such a result to be respected.

CONCLUSION

Were it not for Continental's perceptions that the decisions below make it liable for a large sum of money, more than $300 million, and that it has nowhere else to go to avoid liability, this Court would never see this petition. Continental raised no constitutional or federal issues in the district court, and presented no substantial ones to

the Court of Appeals. There are no federal issues deserving review. This Petition lacks any merit. It should be denied.

Respectfully submitted,

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